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TO: Education and Local Government Interim Committee
FROM: Dan Whyte, Staff Attorney
RE: Administrative Rule Review Authority -- Current Administrative Rules
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Administrative rule review is a primary function of the Education and Local Government Interim Committee (ELG), pursuant to § 5-5-224, MCA. The ELG is responsible for reviewing administrative rules from the following agencies and the entities attached to these agencies for administrative purposes: (1) State Board of Education; (2) the Board of Public Education; (3) the Board of Regents of Higher Education; and (4) the Office of Public Instruction.

To assist the ELG in carrying out its administrative rule review function, the ELG will receive an update at each meeting from legal staff on the status of agency rulemaking activities. The ELG may also receive information from legal staff on specific issues associated with the rulemaking process if and when they arise during the interim. This memorandum contains the following:

- I. A summary of administrative rulemaking.
- II. A summary of ELG's administrative rule review authority.

I. Summary of Administrative Rulemaking

Administrative agencies are frequently authorized to carry out the Legislature's intent by adopting administrative rules, which have the full force of law. There are several reasons why the Legislature may choose to authorize an agency to adopt administrative rules. The most common reason is that an agency, with its technical expertise and resources, is best suited to consider finer policy points. In addition, unlike statutes that may only be adopted every 2 years in Montana, administrative rules may be adopted throughout the year as circumstances change or as issues arise.

Administrative rule functions are governed by the Montana Administrative Procedures Act (MAPA), Title 2, chapter 4 of the Montana Code Annotated, and relevant case law. In Montana, an administrative rule is an "agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency."¹

Agency administrative rules are published in the Administrative Rules of Montana (ARM), which is updated twice a month by a publication known as the Montana Administrative Register

¹ See 2-4-102(11), MCA.

(MAR). The MAR contains notices of proposed new, amended, transferred, repealed, and adopted rules. The MAR also contains notices of public hearings, Attorney General's opinions, and notices of vacancies on state boards. The ARM and the MAR may be accessed electronically at the following website: <http://www.mtrules.org/>.

As noted above, MAPA and relevant case law govern the procedures and requirements for agency rulemaking in Montana.² However, MAPA does not provide the authority for an agency to adopt rules. The authority for an agency to adopt rules is delegated from the Legislature to the agency. A substantive rule may not be proposed or adopted unless "a statute granting the agency authority to adopt rules clearly and specifically lists the subject matter of the rule as a subject upon which the agency shall or may adopt rules" or "the rule implements and relates to a subject matter or an agency function that is clearly and specifically included in a statute to which the grant of rulemaking authority extends." § 2-4-305(a) and (b), MCA. An agency rule may be invalidated if it exceeds the scope of the enabling statute, if it is inconsistent with statutory requirements, or if it adds requirements not contemplated by the Legislature.

MAPA provides several requirements, including the following:

- Notice of the proposed rule must be published in the MAR, which is published by the Secretary of State. The notice must comply with specific timelines. (§ 2-4-302, MCA).
- The agency must contact the primary sponsor of legislation if the agency begins to work on the substantive content and the wording of a proposal notice for a rule that initially implements legislation. The purpose of the notification to the primary sponsor is to obtain the legislator's comments, inform the legislator of the date by which each step of the rulemaking process must be completed, and provide the legislator with information about the time periods during which the legislator may comment on the proposed rules. (§ 2-4-302, MCA).
- An agency must consider all oral and written submissions respecting a proposed rule. (§ 2-4-305, MCA).
- A rule must include a citation to the specific grant of rulemaking authority and must be "reasonably necessary to effectuate the purpose of the statute." (§ 2-4-305, MCA).

II. Summary of legislative committee and ELG administrative rule review authority.

The prescribed duties of interim committees generally include administrative rule review. § 5-5-215, MCA. Pursuant to § 5-5-224, MCA, the ELG has administrative rule review authority over rules from the State Board of Education, Board of Public Education, Board of Regents, and OPI. Title 2, chapter 4, parts 3 and 4, MCA, describe the nature of legislative committee administrative rule review authority. Under these provisions, the ELG may:

² MAPA may be supplanted by specific procedures or requirements set forth in statute that are applicable to the agency.

- Request an agency's rulemaking records for checking compliance with MAPA. (§ 2-4-402(2)(a), MCA).
- Prepare written recommendations for the adoption, amendment, or rejection of a rule and submit those recommendations to the department proposing the rule and submit oral or written testimony at a rulemaking hearing. (§ 2-4-403(3), MCA).
- Require that a rulemaking hearing be held in accordance with the provisions of §§ 2-4-302 through 2-4-305, MCA. (§ 2-4-402(2)(c), MCA).
- Institute, intervene in, or otherwise participate in proceedings involving this chapter in the state and federal courts and administrative agencies. (§ 2-4-402(2)(d), MCA).
- Review the incidence and conduct of administrative proceedings under this chapter. (§ 2-4-402(2)(e), MCA).
- Commence a poll on an objection to a rule. (§ 2-4-403, MCA).
- Require an economic impact statement relating to the adoption of a rule. (§ 2-4-405, MCA).
- Object to a notice of proposed rulemaking and require up to a 6-month delay in the adoption of the rule. (§§ 2-4-305(9) and 2-4-306(4), MCA).
- Object to all or some portion of a proposed or adopted rule the committee considers not to have been proposed or adopted in conformance with MAPA. (§ 2-4-406, MCA).
- Recommend a rule adoption or change. (§ 2-4-411, MCA).

Failure of a committee to object to the adoption, amendment, or repeal of a rule is inadmissible in court to prove the validity of the rule. In addition, the agency must report to the committee any judicial proceedings in which the construction or interpretation of MAPA is at issue. The agency may also report to the committee any judicial proceedings in which the construction or interpretation of any rule of the agency is at issue. (§ 2-4-410, MCA).